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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PAMELA BENNETT et al., Plaintiffs, Cross-defendants, and Appellants, v. BANK OF AMERICA, N.A., Defendant and Respondent; DEUTSCHE BANK NATIONAL TRUST COMPANY, Defendant, Cross-complainant and Respondent.	D072569 (Super. Ct. No. 37-2015-00024336-CU-FR-NC)

APPEAL from judgments of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Affirmed.

James Bennett and Pamela Bennett, in pro. per., for Plaintiffs, Cross-defendants, and Appellants.

Hall Griffin, Howard D. Hall, Jered T. Ede and Taylor Dalton for Defendant, Cross-complainant, and Respondent Deutsche Bank National Trust Co., as Trustee, etc.

McGuireWoods, Leslie M. Werlin and Brittany B. Birch for Defendant and Respondent Bank of America, N.A.

This is the latest in a litany of legal proceedings in which James Bennett and Pamela Bennett (husband and wife), appearing in propria persona, have alleged that various financial institutions engaged in fraud or other unlawful conduct in connection with a foreclosure of the Bennetts' residence. In this case, the Bennetts assert that Deutsche Bank National Trust Co., as Trustees for the Benefit of the GSR Mortgage Loan Trust 2007-OA1 (Deutsche Bank), and/or Bank of America, N.A. (BANA) fraudulently represented that they had authority under a deed of trust to foreclose on the residence at issue and unlawfully acquired the residence at the ensuing foreclosure sale.

The trial court entered judgments in favor of Deutsche Bank and BANA after sustaining BANA's demurrer without leave to amend and requiring each of the Bennetts to post a security under the vexatious litigant statutes (Code Civ. Proc., § 391 et seq.),[1] which they did not do. The Bennetts challenge the orders sustaining BANA's demurrer and requiring them to post securities, as well as a host of interim rulings that were resolved adversely to them earlier in the litigation. We affirm.

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1 All statutory references are to the Code of Civil Procedure unless otherwise noted.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Background*

James Bennett (James)[2] obtained title to a Rancho Santa Fe residence (Property) in 2002. Shortly after, he was charged with four counts of wire fraud, seven counts of bank fraud, and one count of operating a continuing financial crimes enterprise. As discussed in *United States v. Bennett* (9th Cir. 2010) 621 F.3d 1131, 1133-1135, a decision of which we take judicial notice on our own motion (see *Kinney v. Clark* (2017) 12 Cal.App.5th 724, 729 fn. 4), the charges against James arose from a property flipping scheme in which he provided cash to straw purchasers to buy properties, exaggerated the value of those properties through fraudulent appraisals, and duped lenders into issuing inflated mortgage loans for the properties, which were not repaid. The jury convicted James on all counts and eight of the convictions remained in place after he appealed the judgment of conviction. (*Bennett*, *supra*, at p. 1135.)

After his arrest, but before his conviction, James transferred title in the Property to Pamela, who obtained a $2 million loan and executed a promissory note secured by a deed of trust against the Property. The deed of trust identifies Pamela as the borrower, America's Wholesale Lender as the lender, Recontrust Company, N.A. (Recontrust) as the trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee.

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2 Because James Bennett and Pamela Bennett share the same last name, we will refer to them by their first names in the interest of clarity.

Pamela quickly fell into default and, on December 11, 2009, the trustee recorded a notice of default. Shortly after, it recorded an assignment of deed of trust stating that MERS had granted its beneficial interest to Deutsche Bank, as well as a notice of trustee's sale. Pamela filed multiple petitions for Chapter 7 bankruptcy, which postponed the foreclosure; however, those proceedings were dismissed and the foreclosure ultimately resumed. On September 27, 2011, the trustee recorded a second notice of trustee's sale, and, on July 23, 2012, the trustee sold the Property at a nonjudicial foreclosure sale. The trustee recorded a deed upon sale indicating that "Bank of America, N.A. for the Benefit of Deutsche Bank National Trust Company, as Trustee for Holders of the GSR Mortgage Loan Trust 2007-OA1" was both the foreclosing lender and grantee of the Property.[3]

B. *Prior Proceedings*

This is not the first legal proceeding involving the Property in which the Bennetts have proceeded in propria persona. Other such actions include the following:

Bank of America, N.A. v. Bennett, No. 37-2012-00039995-CL-UD-NC (the Unlawful Detainer Action):

On November 9, 2012, BANA filed an unlawful detainer action in the Superior Court of Los Angeles County against Pamela (and later James) seeking possession of the Property. The Bennetts filed a cross-complaint under the Unfair Competition Law (UCL) alleging that BANA had falsified documentation to cause the recording of a notice of

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[3] The trial court properly granted judicial notice of the recorded deed of trust, notices of default and trustee's sale, and deed upon sale. (Evid. Code, § 452, subds. (c) & (h).) We therefore take notice of their existence and contents, but not the disputed or disputable facts stated therein. (*Id.*, § 459, subd. (a).)

default, Deutsche Bank had misrepresented that it was the beneficiary under the deed of trust, and BANA had failed to discuss foreclosure alternatives with the Bennetts in violation of state foreclosure laws.

The trial court entered summary judgment for BANA, but the Appellate Division of the superior court reversed on two grounds: (1) BANA had failed to support its summary judgment motion with evidence; and (2) the automatic stay arising from Pamela's bankruptcy proceedings precluded entry of summary judgment. The parties have not informed us of the status of the Unlawful Detainer Action. However, on our own motion, we take judicial notice of the orders of the trial court that oversaw the Unlawful Detainer Action, which, upon remand, denied a motion to restore the Property to the Bennetts and dismissed the Unlawful Detainer Action at BANA's request.

Bennett v. Bank of America Corp., Case No. BC477322 (the LA Action):

On December 3, 2012, the Bennetts sued Bank of America Corporation, Countrywide Financial Corporation, and Recontrust in the Superior Court of Los Angeles County for fraudulent concealment and intentional misrepresentation. The Bennetts alleged that the defendants misrepresented that they would consolidate the Bennetts' mortgages on the Property into a single low-cost mortgage, causing them to withhold further mortgage payments and fall into default. They also alleged that the defendants failed to discuss mortgage foreclosure alternatives with them, failed to disclose "the true lender and mortgagee," and initiated foreclosure proceedings without recording an accurate notice of default.

The trial court sustained demurrers without leave to amend as to all causes of action brought by James on grounds that he was not listed on the Property's title; accordingly, it dismissed the action with prejudice as to him. It also sustained demurrers without leave to amend as to Pamela's intentional misrepresentation claims. Notwithstanding these rulings, an amended complaint was filed on behalf of *both* James and Pamela asserting the same claims pleaded in the original complaint. Then, yet another complaint was filed on behalf of both James and Pamela, this time alleging the fraudulent concealment cause of action only. The trial court sustained demurrers to the amended pleadings without leave to amend and, in *Bennett v. Bank of America Corp.* (Jan. 15, 2015, B249521) [nonpub. opn.], the Court of Appeal affirmed.

Bennett v. Bank of America, N.A., No. 13-90140-MM and
Bennett v. Bank of America, N.A., No. 13-90209-MM
(the Adversary Proceedings):

In May and August 2013, Pamela filed adversary proceedings against BANA in bankruptcy court alleging that it had orchestrated a "fraudulent transfer" of the Property by violating state foreclosure laws, failing to discuss foreclosure alternatives with her, and falsifying documentation. She further alleged that MERS was the sole beneficiary of the deed of trust and Deutsche Bank had improperly acted as though it were the beneficiary when it instructed the trustee to record a notice of default. The court dismissed the proceedings without prejudice due to insufficient service of process and the pendency of the Unlawful Detainer and LA Actions. The United States Bankruptcy Appellate Panel dismissed Pamela's appeals of those orders (Appeal Nos. SC-13-1408

and SC-13-1551), as did the Ninth Circuit Court of Appeals (Appeal Nos. 14-60018 and 15-60018).

C. *The Current Litigation*

1. The Verified Complaint

On July 22, 2015, Pamela filed this action in the Superior Court of San Diego County, which named "Bank of America, N.A. for the Benefit of Deutsche Bank National Trust Company, as Trustee for Holders of the GSR Mortgage Loan Trust 2007-OA1" as the defendant in the complaint, summons, and service of summons. The defendant adopted Pamela's nomenclature when describing itself in the caption and signature block of its filings. As discussed *post*, this description of the defendant (coupled with the defendant's unfortunate failure to clarify its identity) would generate significant confusion and motion practice. Even today, the parties disagree as to whether the defendant named in the complaint was Deutsche Bank (as Deutsche Bank and BANA contend) or BANA (as the Bennetts contend). Therefore, pending our discussion of that issue, we will simply refer to the defendant named in the complaint as the Bank.

In her complaint, Pamela asserted fraud and wrongful foreclosure claims against the Bank on grounds that it: (1) falsely claimed to be the beneficiary of the deed of trust, when in fact MERS was the beneficiary; (2) forged documentation to trigger a notice of default; and (3) acquired the Property at an unlawful foreclosure sale. Shortly after, an amended verified complaint was filed adding James as a plaintiff and claims for wrongful eviction, quiet title, declaratory relief, cancellation of instruments, and unfair business practices under the UCL. Like the original complaint, the thrust of the amended verified

complaint was that the Bank "show[ed] up out of nowhere, determine[d] a default, foreclose[d] on [the Property] and thereafter forcibly evict[ed]" the Bennetts.

2. The Demurrer and Motion to Strike the Prayer for Punitive Damages

Lengthy and contentious motion practice between the Bennetts and the Bank (whose identity still had not surfaced) ensued. The Bank filed a demurrer to the complaint arguing, inter alia, that the fraud cause of action should be dismissed for lack of specificity, the UCL cause of action should be dismissed for failure to plead injury in fact, and the remaining causes of action should be dismissed because it was "undisputed" that Pamela had "defaulted on the loan" and, therefore, "the loan servicer and the beneficiary were entitled to commence foreclosure proceedings" on the Property. The Bank also filed a motion to strike the Bennetts' prayer for punitive damages.

The Bennetts opposed the demurrer to the fraud claim on grounds that they had pleaded multiple actionable misrepresentations, including misstatements in the notice of default and notices of sale. The Bennetts also argued that they had pleaded injury in fact because they had alleged that they were evicted. Finally, the Bennetts contended that they had properly pleaded that the Bank "was the wrong [b]eneficiary and [was] not empowered to initiate [the] foreclosure . . . ."

The trial court sustained the demurrer without leave to amend as to the fraud and UCL claims and overruled it in all other respects. The court found deficiencies in each of the allegations regarding the Bank's purported misrepresentations. As to the UCL claim, the court found that the Bennetts had not pleaded injury in fact due to the *Bank's* conduct. Further, the court struck the Bennetts' punitive damage allegations, reasoning that they

did not support a showing of malice, oppression, or fraud. However, the court rejected the remainder of the Bank's arguments because the pleadings did not conclusively establish that the Bank had authority to foreclose on the Property.

Thereafter, the Bank filed a verified answer to the amended verified complaint.

3. Summary Judgment

While briefing on the demurrer was ongoing, the Bennetts moved for summary judgment on the basis that MERS alone was authorized to initiate a foreclosure and, thus, the Bank-initiated foreclosure was unlawful. The Bennetts filed no admissible evidence to support their motion. However, they sought and obtained judicial notice of the deed of trust, the notices of default and trustee's sale, and the deed upon sale.

The Bank opposed the Bennetts' motion as untimely. Additionally, it argued that the Bennetts failed to serve it with a separate statement of undisputed facts. Finally, on the merits, the Bank reiterated the arguments it had raised in its demurrer, which had not yet been resolved at the time the Bank opposed the summary judgment motion.

The trial court declined to resolve the Bennetts' summary judgment motion on timeliness grounds because the Bank did not plead that it had suffered prejudice due to the Bennetts' delay. However, it denied summary judgment based on its finding that the Bennetts had not served the Bank with a separate statement of undisputed facts. In particular, the court found that the Bennetts' proof of service was insufficient to create a presumption of valid service because it was not signed under penalty of perjury. It also concluded, in the alternative, that summary judgment was unwarranted because the

Bennetts had submitted no evidence; therefore, the burden of proof never shifted to the Bank to show the existence of a triable issue of material fact.

4. The Amended Verified Answer

After the Bank filed its verified answer to the Bennetts' amended verified complaint, see *ante*, the Bennetts filed a motion to strike the verified answer, a demurrer to the verified answer, and a motion for judgment on the pleadings. In their filings, the Bennetts argued that the Bank's verified answer was deficient because it: (1) was improperly verified; (2) contained false allegations; and (3) admitted allegations from the Bennetts' amended verified complaint that required judgment in favor of the Bennetts.

The Bank then filed an amended verified answer as a matter of right under section 472, subdivision (a), and opposed the Bennetts' motions on grounds that the Bank's amended verified answer superseded its original answer and rendered the Bennetts' motions—all of which targeted the original answer—moot. Unlike the Bank's prior filings, the amended verified answer expressly referred to the Bank as *Deutsche Bank*.

The Bank's amended verified answer incited a flurry of filings addressing the Bank's proper identity. The Bank, for its part, contended that Deutsche Bank was the defendant that had been named in the complaint and had filed on the Bank's behalf since the outset of the litigation. Defense counsel submitted a declaration averring that: (1) "Deutsche Bank [was] and, at all relevant times to this lawsuit, ha[d] always been the beneficiary to the Deed of Trust on [the] Loan and [the] proper party to this action," and (2) there had been no change of parties. The Bennetts, on the other hand, argued that BANA was the defendant and had acted in that capacity since the case began; therefore,

Deutsche Bank was a nonparty that lacked authority to file an amended verified answer. The Bennetts made these arguments in, inter alia, briefs filed in support of their demurrer, motion to strike, and motion for judgment on the pleadings.

The trial court did not expressly address whether the Bennetts had named Deutsche Bank or BANA as the defendant. However, it denied all of the motions in which the Bennetts had argued that Deutsche Bank was not a party—specifically, (1) the motion to strike the Bank's amended verified answer; (2) the demurrer to the Bank's amended verified answer; and (3) the motion for judgment on the pleadings—on grounds that the Bank's filing of an amended verified answer rendered those motions moot.

5. The Cross-Complaints

Together with its amended verified answer, the Bank (now identified as Deutsche Bank) filed a cross-complaint against the Bennetts for fraud, damages under Penal Code section 496, and declaratory relief. The cross-complaint alleged that Deutsche Bank had been the beneficiary of the deed of trust at the time of the foreclosure, BANA had served as Deutsche Bank's attorney-in-fact during the foreclosure, and Deutsche Bank had lawfully acquired title to the Property at the foreclosure sale. It further alleged that the Bennetts had submitted false information to acquire the loan on which Pamela had defaulted. In other words, it alleged that the mortgage Pamela had taken out was part and parcel of the property flipping scheme underpinning James's criminal convictions.

Shortly after, the Bennetts filed a cross-complaint against *BANA* for fraud and malicious prosecution. For their fraud claim, the Bennetts alleged that BANA had stolen the Property, engaged in "fraudulent foreclosure activities," misrepresented that Deutsche

Bank had a beneficial interest in the deed of trust, and violated the state's antideficiency laws. They based their malicious prosecution cause of action on the cross-complaint currently pending against them, thus suggesting that BANA had filed or directed the filing of that cross-complaint. Further, they alleged that James's criminal convictions were "false," "fraudulent," and the result of a "scheme" orchestrated by the prosecutor, his appointed defense counsel, and the federal district court.

BANA filed a demurrer to the Bennetts' cross-complaint, which the trial court sustained without leave to amend. The court concluded that the Bennetts had failed to allege that they had relied on any fraudulent representations made by BANA or suffered any harm due to such reliance. As for the malicious prosecution cause of action, the court found that the Bennetts had failed to allege that BANA had maliciously commenced a legal proceeding resolved in the Bennetts' favor. After sustaining the demurrer with prejudice, the court entered judgment in favor of BANA.

6. The Vexatious Litigant Order

Meanwhile, the Bank (again referring to itself as Deutsche Bank) filed a motion to declare the Bennetts vexatious litigants, require the Bennetts to furnish a security under section 391.3, and enter a prefiling order prohibiting them from filing new litigation in propria persona without first obtaining leave of court under section 391.7.

The Bank argued that the Bennetts were vexatious litigants because they had instituted 27 legal proceedings in propria persona over the last seven years—all of which ended in defeat for them. In its tally, the Bank counted each stage of a litigation as a separate proceeding. For example, in the LA Action, the Bank included the superior

court case, the Court of Appeal action, and (unsuccessful) Supreme Court petition for review as three proceedings. The Bank counted the Bennetts' Chapter 7 bankruptcy petitions as nine proceedings, the Adversary Proceedings as six proceedings, and writ petitions arising out of the Unlawful Detainer Action as another seven proceedings. Finally, the Bank included in its tally a civil case between James and one of the victims of his property flipping scheme, which ended in a Court of Appeal opinion adverse to James. (*Bennett v. Flagstar Bank, Inc.* (Mar. 7, 2011, No. B222611) [nonpub. opn.].)

Based on this showing, the court found the Bennetts vexatious litigants under both subdivisions (b)(1) and (b)(2) of section 391, and imposed a pre-filing order on them pursuant to section 391.7. Further, it ordered the Bennetts each to post a $220,000 security after finding there was no reasonable probability that they would prevail in this action. In particular, it concluded that this litigation encompassed "the same matters and involved the same primary rights as were litigated or could have been raised in the LA [Action]" and the parties in this litigation are the same or in privity with those in the LA Action; therefore, res judicata applied. Alternatively, it found that the Bennetts' complaint was time-barred under the three-year statute of limitations set forth in section 338, subdivision (a). Finally, it concluded that the Bennetts lacked a reasonable probability of success based on, inter alia, the recorded trustee's deed upon sale listing Deutsche Bank as the foreclosing lender and grantee of the Property. The Bennetts did not post the court-ordered undertakings and, as a result, the court dismissed the Bennetts' complaint and entered judgment in favor of the Bank.

II

DISCUSSION[4]

A. *Deutsche Bank's Status as a Party-Defendant*

At the outset, we must address the Bennetts' argument that Deutsche Bank was not the defendant against whom Pamela initially filed suit—an argument that permeates virtually every other claim they make on appeal. For the following reasons, we reject the Bennetts' argument and conclude that Deutsche Bank—not BANA—was the sole defendant at all times prior to the Bennetts' filing of a cross-complaint against BANA.

We begin with an observation that the parties should not dispute: the complaint, summons, and proof of service of summons do not, standing alone, identify the defendant with enough particularity to discern the defendant's identity. As noted, these filings refer to the defendant as "Bank of America, N.A. for the Benefit of Deutsche Bank National Trust Company, as Trustee for Holders of the GSR Mortgage Loan Trust 2007-OA1."

On the one hand, this description reasonably could be interpreted as referring to BANA based on its conduct while acting as alleged attorney-in-fact for its principal, Deutsche Bank. The same can be said for the substantive allegations of the complaint,

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4 We note that the Bennetts express their arguments in a disorganized, unintelligible fashion, and frequently cite inapposite portions of the appellate record that do not support their contentions. This alone gives us ample basis to find many, if not all, of their arguments waived. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546 [" 'This court is not inclined to act as counsel for . . . appellant and furnish a legal argument as to how the trial court's rulings" were erroneous].) Nevertheless, we will address their arguments with the aim of bringing finality to the case.

which include an allegation that the defendant initiated the Unlawful Detainer Action. As noted, *BANA*—not Deutsche Bank—filed the Unlawful Detainer Action.

On the other hand, one could just as reasonably conclude that Pamela would have named "Bank of America, N.A." as the defendant or alleged that the defendant was acting in its capacity as the agent of Deutsche Bank, if she had intended to sue BANA. She did not. Instead, she included "for the Benefit of Deutsche Bank National Trust Company" as a descriptor for the defendant, which suggests that Deutsche Bank was both the real party in interest and defendant identified in the complaint. (*In re A.L.* (2014) 224 Cal.App.4th 354, 363 ["A real party in interest is defined as ' " 'any person or entity whose interest will be directly affected by the proceeding . . . .' " ' "].) Further, the complaint alleges that the defendant "claim[ed] to be either a nominee and/or beneficiary" under the deed of trust when, in fact, MERS was the beneficiary. This allegation is virtually identical to an allegation Pamela previously made about *Deutsche Bank*—not BANA—which also suggests that Deutsche Bank was the defendant named in the complaint.[5]

Faced with these ambiguities, we are forced to turn to the trial court's rulings for clarity. As noted, the Bennetts filed various briefs urging the trial court to sustain their pending demurrer to the Bank's verified answer, grant their motion to strike the Bank's

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[5] Specifically, Pamela alleged the following in the Adversary Proceedings: "[T]he beneficiary [that] instructed the trustee . . . to record the notice [of default] [was] *Deutsche Bank National Trust Company*, not MERS, who [was] the only entity authorized by Plaintiff Pamela Bennett through the signed Deed of Trust to approve the recording . . . . *Deutsche Bank National Trust Company* [was] not the beneficiary or mortgagee and [thus engaged in] an unlawful business practice." (Italics added.)

verified answer, and/or grant their motion for judgment on the pleadings on grounds that Deutsche Bank was a nonparty to the action and, therefore, had no authority to file the amended verified answer that might otherwise have mooted the Bennetts' motions. However, the trial court *denied* all of the Bennetts' motions, finding that they were "moot in light of the filing of [the] amended [verified] answer . . . ."

The trial court's orders are cursory and do not address the Bennetts' arguments pertaining to the identity of the defendant. Further, the Bennetts have elected not to include reporters' transcripts in their appellate record, which might otherwise have enabled us to review the trial court hearings on the Bennetts' motions. However, "[i]t is a fundamental principle of appellate review that we presume that a judgment or order is correct. [Citations.] Moreover, it is the appellant's burden of providing a record that establishes error, and where the record is silent, we must indulge all intendments and presumptions to support the challenged ruling. [Citations.] From these principles, courts have developed the doctrine of implied findings by which the appellate court is required to infer that the trial court made all factual findings necessary to support the order or judgment." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1271 (*Laabs*).)

"Applying this doctrine here, we are required to infer from the court's denial of the [Bennetts'] motion[s] that it made the determinations necessary to support its order[s]." (*Laabs, supra,* 163 Cal.App.4th at p. 1272.) In particular, we must infer that the court found that Deutsche Bank was the defendant-Bank—a finding necessary to conclude that Deutsche Bank's amendatory pleading mooted the Bennetts' motions. Further, this conclusion was supported by substantial evidence in the form of defense counsel's

declaration averring that Deutsche Bank was and at all relevant times had been the beneficiary under the deed of trust and the defendant in this action.

Based on this evidence, as well as the absence of a complete appellate record dictating otherwise, we find no error in the trial court's implied finding that Deutsche Bank was the defendant named in the verified complaint.

B. *The Security Requirement*

Having addressed that preliminary issue, we proceed to the Bennetts' challenge to the order declaring them vexatious litigants and requiring them each to furnish a security. The Bennetts contend that the trial court erred in two respects, by finding that they: (1) are vexatious litigants; and (2) had no reasonable probability of success.

1. Vexatious Litigant Finding

"The vexatious litigant statutes were created to curb misuse of the court system by those acting in propria persona who repeatedly file groundless lawsuits or attempt to relitigate issues previously determined against them. [Citations.] These statutes allow a defendant in a litigation to move for an order requiring the plaintiff to furnish security on the ground the plaintiff is a vexatious litigant and has no reasonable probability of prevailing against the moving defendant. [Citation.] If, after a hearing, the court finds for the defendant on these points, it must order the plaintiff to furnish security. [Citation.] If the plaintiff does not do so, the action will be terminated." (*Goodrich v. Sierra Vista Regional Medical Center* (2016) 246 Cal.App.4th 1260, 1265.)

Section 391 identifies four situations in which a person may be declared vexatious:

> (1) In the immediately preceding seven-year period [the person] has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.
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> (2) After a litigation has been finally determined against the person, [the person] repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.
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> (3) In any litigation while acting in propria persona, [the person] repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.
>
> (4) [The person] [h]as previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

(§ 391, subds. (b)(1) & (2).)

"The trial court exercises its discretion in determining whether a person is a vexatious litigant. Review of the order is accordingly limited and the Court of Appeal will uphold the ruling if it is supported by substantial evidence. Because the trial court is best suited to receive evidence and hold hearings on the question of a party's vexatiousness, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment." (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 636.)

The trial court found that the Bennetts are vexatious litigants under both subdivisions (b)(1) and (b)(2) of section 391. On appeal, the Bennetts challenge the trial

court's finding under subdivision (b)(1). However, apart from a fleeting citation to subdivision (b)(2), which appears to be a typo,[6] the Bennetts do not address the court's alternative finding under subdivision (b)(2). On that basis alone, we conclude that the Bennetts have waived their challenge to the finding that they are vexatious litigants.[7] (*David v. Medtronic, Inc.* (2015) 237 Cal.App.4th 734, 740 (*David*) [a party's failure to challenge a "second, independent ground" underpinning an order on review constitutes waiver].)

Even if the issue were properly presented to us, substantial evidence supports the trial court's finding that the Bennetts are vexatious litigants under section 391, subdivision (b)(2). In the Adversary Proceedings, Pamela contended that BANA violated state foreclosure laws during the foreclosure of the Property, failed to discuss foreclosure alternatives with her, and falsified documents to transfer title in the Property. She also alleged that Deutsche Bank misrepresented that it was the beneficiary under the deed of trust. The bankruptcy court dismissed her claims and the United States Bankruptcy Appellate Panel and Ninth Circuit Court of Appeals dismissed her appeals.

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6 The Bennetts cite section 391, subdivision (b)(2) one time, but do so only after quoting the statutory language of section 391, subdivision (b)(1).

7 The Bennetts dispute the trial court's finding that they are vexatious litigants under section 391, subdivision (b)(2) in their reply brief and in court-ordered supplemental briefing. However, new substantive arguments raised for the first time in a reply brief and/or supplemental brief are deemed forfeited. (*Padron v. Watchtower Bible & Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246, 1266-1267 (*Padron*); *Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 936.)

Similarly, in the LA Action, the Bennetts alleged that BANA's parent corporation, Bank of America Corporation, violated state foreclosure laws during the foreclosure at issue, failed to disclose "who the true lender and mortgagee was," and recorded an invalid notice of default. The court sustained a demurrer without leave to amend as to all of James's claims and certain of Pamela's claims; therefore, it dismissed James with prejudice. Nevertheless, the Bennetts filed another two complaints reinserting James as a plaintiff and, in one of the complaints, realleging claims on Pamela's behalf that the court had already dismissed with prejudice. The court then entered an order sustaining the defendants' demurrers with prejudice, which the Court of Appeal affirmed.

Now, in this action, the Bennetts *again* have alleged (in their cross-complaint) that BANA participated in a fraudulent scheme to steal the Property from them, circumvented state foreclosure laws, and publicly misrepresented that Deutsche Bank possessed a beneficial interest in the deed of trust recorded against the Property.

As this extensive history of litigation establishes, the Bennetts have "repeatedly relitigate[d] or attempt[ed] to relitigate . . . issues of fact or law . . . concluded by the final determination against the same defendant"—specifically, whether BANA orchestrated a fraudulent scheme to steal the Property, violated statutory foreclosure laws, and misrepresented the identity of the beneficiary under the deed of trust. (§ 391, subd. (b)(2).) Pamela has sought to litigate these issues in the first Adversary Proceeding, the second Adversary Proceeding, the LA Action, and this action. James has sought to litigate these issues in the LA Action—initially *before* his dismissal with prejudice, and then a second time *after* his dismissal with prejudice—and in this action. Accordingly,

we conclude that substantial evidence supported the finding that the Bennetts are vexatious litigants under section 391, subdivision (b)(2).[8]

The Bennetts contend that the Adversary Proceedings were not "litigations" as that term is defined in the vexatious litigant statutes. Under those statutes, a "litigation" refers to "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (§ 391, subd. (a).) According to the Bennetts, the Adversary Proceedings are not "civil actions or proceedings," and thus are not "litigations," because they arose out of federal bankruptcy proceedings. We disagree.

"Adversary proceedings are merely federal civil actions under another name . . . . [¶] The parties are named in the pleadings; the claims are those presented in the respective counts of the complaint. The litigation is conducted under the Federal Rules of Civil Procedure (as incorporated by Bankruptcy Rules) and follows the ordinary pattern of summons and complaint, answer, discovery, pretrial, trial, and judgment." (*In re Belli* (Bankr. 9th Cir. 2001) 268 B.R. 851, 854-855; see also, e.g., Fed. Rules Bankr. Proc., rule 9002 [defining a "civil action" to include adversary proceedings].)

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8 " 'The constant suer . . . becomes a serious problem to others than the defendant he dogs. By clogging court calendars, he causes real detriment to those who have legitimate controversies to be determined and to the taxpayers who must provide the courts.' " (*In re Kinney* (2011) 201 Cal.App.4th 951, 958.) Therefore, for purposes of determining the Bennetts' vexatious litigant status under subdivision (b)(2) of section 391, it is inconsequential that Deutsche Bank filed the vexatious litigant motion and yet BANA was the defendant in the prior litigations discussed above. (*Holcomb v. U.S. Bank Nat. Assn.* (2005) 129 Cal.App.4th 1494, 1505 ["[S]ection 391, subdivision (b)(2) does not require a connection between the previous relitigation attempts and the movant or action in which security is sought"].)

Further, "[t]he term 'litigation' is broadly defined in section 391, subdivision (a) as meaning '*any* civil action or proceeding, commenced, maintained or pending in *any* state of federal court. ' " (*Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1170, italics added.) This definition does not exclude civil actions or proceedings based on the *type* of federal court in which they were filed or maintained (e.g., bankruptcy court); rather, it applies to *any* civil action or proceeding in *any* federal court. (*Cal. State Auto. Assn. Inter-Insurance Bureau v. Warwick* (1976) 17 Cal.3d 190, 195 ["From the earliest days of statehood we have interpreted 'any' to be broad, general and all embracing."].) Based on this broad definition, as well as the civil nature of adversary proceedings, we decline to interpret the statutory term "litigation" in the narrow fashion advanced by the Bennetts.

The Bennetts also contend that the Adversary Proceedings were not "finally determined" because the bankruptcy court dismissed Pamela's claims without prejudice on grounds other than their merits. However, a "litigation is finally determined when avenues for direct review (appeal) have been exhausted or the time for appeal has expired." (*Garcia v. Lacey* (2014) 231 Cal.App.4th 402, 407 fn. 5 (*Garcia*).) "Only where the dismissal leaves some doubt regarding the defendant's liability, as where the dismissal is part of a negotiated settlement, will the dismissal not be deemed a termination favorable to the defendant." (*Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 779-780.) Thus, it is not relevant, as the Bennetts argue, whether the determination was made with or without prejudice. (*Ibid.* [rejecting claim that voluntary dismissal without prejudice was not a final determination under the vexatious litigant statutes].)

Applying the proper definition of finality discussed *ante*, there can be no dispute that the Adversary Proceedings are final. Pamela appealed the bankruptcy court's orders to the United States Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals, which dismissed her appeals on July 8, 2015 and January 31, 2017. The Bennetts have directed us to no evidence suggesting that Pamela requested rehearing or appealed the Ninth Circuit's decisions to the United States Supreme Court. Further, the time to do so has long since passed. (Fed. Rules App. Proc., rule 40(a)(1) [generally, a petition for rehearing must be filed within 14 days of entry of judgment]; 28 U.S.C. § 2101(c) [requiring a petition for review to be filed within 90 days of entry of judgment].)

For all of these reasons, we affirm the trial court's determination that the Bennetts are vexatious litigants.[9]

2. Probability of Success

As noted, the vexatious litigant statutes permit a defendant to bring a motion to require a plaintiff to furnish a security. (§ 391.1.) The security is intended to "benefit the moving defendant" and is set at "such amount and within such time as the court shall fix." (§ 391.3.) To prevail on a motion requiring the posting of a security, the burden is on the defendant to establish that: (1) the plaintiff is a vexatious litigant; and (2) there is not a reasonable probability that he or she will prevail against the moving defendant. (*Ibid.*) If the plaintiff does not furnish the court-ordered security, the court "shall" dismiss the

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[9] Because substantial evidence supports the trial court's finding of vexatious litigant status under section 391, subdivision (b)(2), we do not decide whether the court correctly concluded that the Bennetts are also vexatious litigants under subdivision (b)(1).

litigation as to the defendant for whose benefit it was ordered furnished. (§ 391.4.) "[A] court's decision that a vexatious litigant does not have a reasonable probability of success is based on an evaluative judgment in which the court is permitted to weigh evidence. [Citation.] A trial court's conclusion that a vexatious litigant must post security does not, as with a demurrer, terminate the action or preclude a trial on the merits. Rather, it merely requires the party to post security. Accordingly, if there is any substantial evidence to support a trial court's conclusion that a vexatious litigant had no reasonable probability of prevailing in the action, it will be upheld." (*Garcia*, *supra*, 231 Cal.App.4th at p. 408.)

The trial court concluded that the Bennetts had no reasonable probability of success for three reasons. According to the court, the Bennetts' complaint was predicated on the same matters and involved the same primary rights that were litigated or could have been litigated in the LA Action, the parties in this action are the same or in privity with the parties in the LA Action, and the doctrine of res judicata therefore barred the Bennetts' claims as a matter of law. In the alternative, it found that the Bennetts' claims were time-barred. Finally, it found—based on, among other documents, the recorded trustee's deed upon sale—that there was no reasonable probability the Bennetts could establish that the foreclosure sale and eviction were wrongful.

On appeal, the Bennetts raise a handful of challenges to the trial court's first finding that their complaint was precluded by the doctrine of res judicata. We do not address this issue, however, because the Bennetts' Opening Brief does not address either of the alternative bases on which the trial court found that the Bennetts did not have a reasonable likelihood of success—i.e., the court's finding that the claims were time-

barred and unlikely to prevail due to the recorded trustee's deed upon sale.[10] As such, we deem as waived the Bennetts' challenge to the trial court's security order. (*David, supra*, 237 Cal.App.4th at p. 740.)

C. *The Order Sustaining BANA's Demurrer*

The Bennetts also challenge the trial court's order sustaining BANA's demurrer to their cross-complaint without leave to amend. However, except for a passing statement that "[i]t was not proper for the [c]ourt to [s]ustain the [d]emurrer to the Bennetts'[s] [c]ross-[c]omplaint," the Bennetts do not address the order sustaining BANA's demurrer. Because they do not address the merits of the trial court's order, we consider any appeal of that ruling waived. (*Pfeifer v. Countrywide Home Loans, Inc*. (2012) 211 Cal.App.4th 1250, 1282 [" ' "Although our review of a [demurrer] is de novo, it is limited to issues [that] have been adequately raised and supported in plaintiffs' brief." ' "].)

D. *The Interim Orders*

In addition to the rulings discussed *ante*, the Bennetts challenge an array of orders from earlier in the litigation, including orders: (1) sustaining, in part, the Bank's demurrer to the Bennetts' amended verified complaint and striking the Bennetts' request for punitive damages; (2) overruling the Bennetts' demurrer to the Bank's verified amended answer, denying the Bennetts' motion to strike the Bank's verified amended

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[10] Although the Bennetts' reply brief discusses the trial court's finding that their claims are time-barred, they have waived the issue by not addressing it in their Opening Brief. (*Padron, supra*, 16 Cal.App.5th at pp. 1266-1267.)

answer, and denying the Bennetts' motion for judgment on the pleadings, and (3) denying the Bennetts' summary judgment motion. We address each category of orders in turn.

1. The Bank's Demurrer and Motion to Strike

The Bennetts contend that the trial court erred when it sustained, in part, the Bank's demurrer, dismissed the Bennetts' fraud and UCL causes of action, and struck the Bennetts' prayer for punitive damages. Specifically, they contend that their verified amended complaint sufficiently identified the misrepresentations underpinning their fraud claim, alleged injury of fact, and pleaded allegations to support an award of punitive damages. However, we need not reach any of these contentions because—irrespective of their merits—the Bennetts' claims and request for punitive damages would have been dismissed when the Bennetts failed to post a security bond. Accordingly, the Bennetts cannot show that the asserted errors were sufficiently prejudicial to justify a reversal.

Tanguilig v. Neiman Marcus Group, Inc. (2018) 22 Cal.App.5th 313 is instructive. In that case, the trial court sustained an employer's demurrer to several claims asserted by a former employee and, after complications delayed the prosecution of the case, granted the employer's motion to dismiss the entire action for failure to bring it to trial within five years. (*Id.* at pp. 318, 320.) On appeal, the employee argued that the demurrer ruling was reversible error. (*Id.* at pp. 333-334.) The *Tanguilig* court disagreed: "[B]ecause [the employee] failed to bring her suit to trial within the statutory five-year period, the claims at issue on demurrer would have been subject to dismissal . . . even if [the court] were to agree that the demurrer was erroneously sustained in some respect." (*Id.* at p.

334.) "Thus, the challenged rulings did not prejudice [the employee], and absent a showing of prejudice, there [was] no basis for reversal." (*Id.* at p. 321.)

Like the claims belonging to the *Tanguilig* plaintiff, the Bennetts' claims (and request for punitive damages) invariably would have been dismissed later in the litigation—when they failed to post a court-ordered security. Thus, any error in the demurrer and motion to strike rulings did not prejudice the Bennetts' rights. Further, we requested that the parties submit supplemental briefing to address the degree of prejudice, if any, arising from the demurrer and motion to strike rulings in light of the subsequent dismissal of the action in its entirety. Although the Bennetts filed a supplemental brief, it was non-responsive to our request. "[A]n appellant has the burden to show not only that the trial court erred but also that the error was prejudicial." (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 347.) Because the Bennetts have not satisfied this burden, we have no basis upon which to reverse.

2. The Bennetts' Demurrer, Motion to Strike the Verified Answer, and Motion for Judgment on the Pleadings

Next, the Bennetts argue that the trial court erred in overruling or denying three motions pertaining to the parties' pleadings—(1) the Bennetts' demurrer to the Bank's verified answer; (2) the Bennetts' motion to strike the Bank's verified answer, and (3) the Bennetts' motion for judgment on the pleadings. They raise two arguments relating to these rulings, claiming that: (1) the verification for the Bank's verified answer was defective; and (2) the Bank's verified answer admits many of the Bennetts' allegations.

The trial court declined to reach these arguments because it found that they became moot when the Bank filed an amended verified answer under section 472. We agree.

"[S]ection 472 grants a [party] the right to file an amended [pleading] in response to a demurrer at any time before the hearing on the demurrer. '[T]he purpose of the statute permitting amendments as of right before an answer[,] [demurrer, or motion to strike] is filed or a demurrer [or motion to strike] is ruled upon is to promote judicial efficiency and reduce the costs of litigation.' " (*People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 505-506 (*Strathmann*).) The Bank exercised its rights under section 472 when it responded to the Bennetts' demurrer by filing an amended verified answer.[11]

The Bank's filing of an amended verified answer " 'supersede[d] the original one, which cease[d] to perform any function as a pleading.' " (*Strathmann*, *supra*, 210 Cal.App.4th at p. 506.) Because the amended verified answer superseded the original verified answer, it mooted the Bennetts' motions, all of which were directed to the validity of the original verified answer. (*Ibid.*; *State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1131 ["Because there is but one complaint in a civil action . . . the filing of an amended complaint moots a motion directed to a prior complaint."].)

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11 In their reply brief, the Bennetts argue for the first time that the Bank's amended verified answer was not timely filed. As the Bennetts did not raise this argument in their Opening Brief, we deem it waived. (*Padron*, *supra*, 16 Cal.App.5th at pp. 1266-1267.)

The Bennetts do not articulate any point of disagreement with the trial court's rulings, except for their claim that Deutsche Bank was not the proper defendant in this action—an issue we rejected *ante*. Accordingly, we find no merit to the Bennetts' argument that the trial court erred in overruling their demurrer, denying their motion to strike, and denying their motion for judgment on the pleadings.

3. The Bennetts' Summary Judgment Motion

Finally, the Bennetts contend the trial court erred by denying their motion for summary judgment. Although the Bennetts raise an array of arguments as to why they believe the foreclosure of the Property was illegitimate,[12] they do not challenge the trial court's finding that they failed to serve the Bank with a separate statement of undisputed facts. In fact, apart from an unsupported statement that the court "misplaced" the separate statement of facts and "erroneously claimed the Bennett [*sic*] did not file or serve the [d]ocument," the Bennetts do not address the issue. Because the Bennetts do not address this issue, we treat the Bennetts' challenge as waived. (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 368 [" 'Though

12 The Bennetts' arguments, as best we can discern, are summarized as follows: (1) Deutsche Bank designated as its attorney-in-fact a defunct corporation that no longer existed at the time of the designation because the corporation had already merged with BANA; (2) the Appellate Division's reversal of the trial court's summary judgment order in the Unlawful Detainer Action has a res judicata effect in this case; (3) the Property was improperly sold at the foreclosure sale for no consideration; and (4) the Bank made various judicial admissions that support the Bennetts' allegations.

summary judgment review is de novo, review is limited to issues adequately raised and supported in the appellant's brief.' "].)[13]

Even if the Bennetts had not waived the issue, we would affirm the trial court's summary judgment ruling because the Bennetts filed no evidence to support their motion and instead relied entirely on judicially-noticed materials. "[W]hile we take judicial notice of the *existence* of the documents . . . we do not take judicial notice of the truth of the facts asserted in such documents. [Citation.] Thus, even if there [were] facts asserted within the records specified by the [Bennetts] that might cure the evidentiary gap in [their] motion, the [Bennetts] cannot rely upon them to satisfy [their] burden of production in this case." (*Laabs*, *supra*, 163 Cal.App.4th at p. 1266; *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375-1376 [it is error to rely on

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13 Because the Bennetts have waived their challenge to the summary judgment order, we deny as irrelevant their request for judicial notice of a handful of documents (a certificate of merger and a Federal Trade Commission consent judgment) that they believe bear upon the correctness of the trial court's summary judgment order. (*Hayward Area Planning Assn. v. City of Hayward* (2005) 128 Cal.App.4th 176, 182.) We also deny the Bennetts' request for judicial notice of filings and orders in certain writ proceedings before this court, as well as filings and orders in the trial court relating to Deutsche Bank's postjudgment motion for attorney's fees, which are likewise irrelevant to the outcome of the appeal. (*Ibid*.) Further, we deny their request for judicial notice of excerpts from prejudgment filings in this case, which are already part of the appellate record. (*Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1193 fn. 7.) Finally, the Bennetts ask us to take judicial notice of a document that purports to be a redacted e-mail communication between James and an unidentified "law enforcement" officer, which, according to the Bennetts, proves the existence of a conspiracy between the Bank and the trial court judge in this action. We do not consider this exhibit, which is not part of the appellate record and, in any event, does not support the Bennetts' conspiracy argument. (*Peters v. State of California* (1987) 188 Cal.App.3d 1421, 1425 fn. 1.)

judicially noticed recorded documents on summary judgment where the issue of a party's beneficial interest in a deed of trust is disputed].)

DISPOSITION

The judgments are affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.